

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TERRANCE KWIATKOWSKI,

Plaintiff,

V.

BANK OF AMERICA NA, *et al.*,

Defendants.

Case No. 2:12-CV-00489-KJD-CWH

ORDER

Before the Court is the Motion to Dismiss (#5) of Defendants Bank of America, N.A., and ReconTrust Company, N.A. Plaintiff has filed an opposition (#19) and Defendants filed a reply (#22).

I. Background

Plaintiff is the owner of a property at 1371 Opal Valley, Henderson, Nevada and is in default on his mortgage. According to the Complaint, Bank of America is the “servicer and/or lender” and appointed Defendant ReconTrust as trustee. ReconTrust is proceeding with foreclosure under N.R.S. 107, *et. seq.* Plaintiff filed this action in Clark County District Court and Defendant removed the action here.

1 Plaintiff claims that ReconTrust is a subsidiary of Bank of America and, accordingly, is
 2 prohibited from acting as trustee by N.R.S. § 107.028. Plaintiff also makes several common law
 3 claims including breach of contract, breach of an implied covenant of good faith and fair dealing,
 4 intentional and negligent misrepresentation and negligence.

5 II. Discussion

6 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
 7 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short
 8 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.
 9 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require
 10 detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic
 11 recitation of the elements of a cause of action." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)
 12 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise
 13 above the speculative level." Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a
 14 complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its
 15 face." Iqbal, 129 S. Ct. at 1949 (internal citation omitted).

16 In Iqbal, the Supreme Court clarified the two-step approach district courts are to apply when
 17 considering motions to dismiss. First, a district court must accept as true all well-pled factual
 18 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
 19 Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory
 20 statements, do not suffice. Id. at 1949. Second, a district court must consider whether the factual
 21 allegations in the complaint allege a plausible claim for relief. Id. at 1950. A claim is facially
 22 plausible when the plaintiff's complaint alleges facts that allows the court to draw a reasonable
 23 inference that the defendant is liable for the alleged misconduct. Id. at 1949. Where the complaint
 24 does not permit the court to infer more than the mere possibility of misconduct, the complaint has
 25 "alleged—but not shown—that the pleader is entitled to relief." Id. (internal quotation marks
 26

1 omitted). When the claims in a complaint have not crossed the line from conceivable to plausible,
 2 the complaint must be dismissed. Twombly, 550 U.S. at 570.

3 1. N.R.S. § 107.028

4 In 2011, the Nevada Legislature amended Chapter 107 of the Nevada Revised Statutes to
 5 include a new section providing:

6 The trustee does not have a fiduciary obligation to the grantor or any other person
 7 having an interest in the property which is subject to the deed of trust. The trustee
 8 shall act impartially and in good faith with respect to the deed of trust and shall act in
 accordance with the laws of this State. A rebuttable presumption that a trustee has
 9 acted impartially and in good faith exists if the trustee acts in compliance with the
 provisions of NRS 107.080.

10 Nev.Rev.Stat. § 107.028(5). This amendment was effective October 1, 2011. (A.B. 284 §§ 6, 15,
 11 amended by A .B. 273 §§ 5.8, 5.95, 2011 Leg., 76th Sess. (Nev.2011).)

12 In the Complaint, Plaintiff claims that ReconTrust cannot properly act as trustee because it
 13 has an improper fiduciary obligation to Bank of America. Specifically, Plaintiff asserts that
 14 Defendants violated this statute because the trustee ReconTrust is a subsidiary of Bank of America.¹

15 This section is plainly designed to codify the long recognized legal principle that the trustee
 16 does not become subject to a fiduciary obligation because of the deed of trust. See Villagrana v.
17 Recontrust Co., N.A., 2012 WL 1890236, 3 (D. Nev. May 22, 2012) (noting Nevada Legislature's
 18 ratification of this principle by enacting N.R.S. § 107.028). Plaintiff cites no case law or legislative
 19 history suggesting that N.R.S. § 107.028 was enacted to prohibit a trustee from having a fiduciary
 20 relationship with someone who has an interest in the property. Additionally, judicially noticeable
 21 documents show that Bank of America has no interest in the property because it is only the servicer
 22 of the loan, not the lender. Bank of America is not the "grantor or any other person having an
 23 interest in the property which is subject to the deed of trust" and nothing prohibits ReconTrust from
 24 acting as trustee. Accordingly, Plaintiff fails to state a claim for violations of N.R.S. § 107.028.

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 26 ¹ For reasons that are unclear to the Court, the Complaint states that Defendants' actions damaged "Plaintiff and
 Class Members."

1 Because this claim cannot be cured by amendment, leave to amend Plaintiff's N.R.S. § 107.028
2 claim is denied. See DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir.1992).

3 2. Common Law Claims

4 In the opposition, Plaintiff's counsel concedes that "certain factual allegations concerning its
5 (sic) breach of contract, negligence, breach of covenant of good faith and fair dealing, and
6 misrepresentation claims are lacking." Since Plaintiff has failed to provide any opposition to the
7 Motion to Dismiss the common law claims, dismissal is granted. See Local Rule 7-2.

8 Plaintiff's counsel also requests leave to amend the Complaint to add the facts that were
9 "lacking" from the original Complaint. Both state procedural rules and Federal Rule of Civ. P. 11(b)
10 impose a duty on Plaintiff's counsel to make a reasonable inquiry into the underlying facts of the
11 claims asserted in a complaint before signing it and submitting it to the Court. Plaintiff's counsel's
12 admission that the Complaint lacks factual support for the majority of the claims suggests he did not
13 perform the duties imposed on him as officer of this Court.

14 The Court has doubts that the deficiencies in the Complaint can be cured by amendment.
15 However, since leave to amend is to be freely given, Plaintiff may amend the common law claims in
16 his Complaint within 14 days of the date of this order. Plaintiff's counsel is warned that he is
17 required to comply in every respect with the Federal Rules of Civil Procedure, including Rule 11(b)'s
18 requirement that every pleading be based on knowledge, information, and belief, formed after
19 reasonable inquiry. Failure to comply with the rules and this Order will result in sanctions, including
20 a requirement that Plaintiff's counsel pay attorney's fees incurred by Defendants in responding to any
21 claims that lack factual support.

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III. Conclusion

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#5) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff may file an amended complaint that complies in every respect with the Federal Rules within 14 days from the date of this order.

DATED this 5th day of September 2012.



Kent J. Dawson
United States District Judge